

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GREAT-WEST LIFE & ANNUITY
 INSURANCE CO., *et al.*,

Plaintiff,

vs.

AMERICAN ECONOMY INSURANCE
 CO., *et al.*,

Defendants.

Case No. 2:11-cv-02082-APG-CWH

ORDER

This matter is before the Court on Defendants' Partially Unopposed Motion to Stay One Aspect of Magistrate Judge's September 23, 2013 Discovery Order Pending Ruling by District Judge on Written Objections (#155), filed October 4, 2013; Plaintiffs' Response (#162), filed October 16, 2013; and Defendants' Reply (#163), filed October 18, 2013. The Court will also consider Plaintiffs' Unopposed Motion for Extension of Time to Respond (#164), filed October 21, 2013.

1. Defendants' Motion to Stay (#155)

Defendants (hereinafter "AEI") request a stay of the Court's order (#153) pending resolution of their objection to the finding that AEI waived its privilege with respect to the documents identified in the Court's order as the Kezer documents. The stay is necessary, according to AEI, to "avoid any dissemination or use by Plaintiffs or others of the privileged documents at issue while the Order is being reviewed" and to "maintain the status quo" during review. AEI asserts that it has "substantial arguments" for reversing the order, including that the undersigned committed clear error by: (1) finding that AEI's expert "considered" the Kezer documents; (2) concluding that the Kezer documents are not covered by the parties' claw back agreement or Fed. R. Evid. 502; and (3) applying what AEI contends is essentially a bright line rule regarding waiver.

Plaintiffs (hereinafter "Great West") oppose the motion arguing that AEI is highly unlikely

1 to succeed on its argument that the undersigned committed clear error by crediting sworn
2 deposition testimony over a “self-serving declaration” submitted by an expert contradicting the
3 deposition testimony. Great West further contends that: (1) a stay is not necessary as they have
4 already agreed not to disseminate any of the subject documents outside the litigation, which
5 eliminates any potential for irreparable injury to AEI; (2) a stay would prevent Great West from
6 analyzing and discussing the contested documents within the context of the appeal, thus eliminating
7 argument on the threshold issue of whether the documents are privileged in the first instance; and
8 (3) a stay would cause further delay in the litigation.

9 AEI replies that “it is more important for the administration of justice for this Court to reach
10 a well-considered ruling on an issue that potentially could affect many other litigants, than to rush
11 this case through to completion of discovery before the District Judge has time to rule” on the
12 written objections. AEI reiterates its argument that it will be irreparably harmed if Great West is
13 permitted to review and use the Kezer documents, even if such use is limited to opposing AEI’s
14 written objections.

15 DISCUSSION

16 “A stay is an ‘intrusion into the ordinary process of administration and judicial relief.’
17 *Nken v. Holder*, 556 U.S. 418, 427 (2009). “A stay is not a matter of right It is instead ‘an
18 exercise of judicial discretion’ . . . [that] ‘is dependant upon the circumstances of the particular
19 case.’” *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (citation omitted). In exercising its
20 discretion, a court is guided by the following legal principles: (1) has the movant made a strong
21 showing it is likely to succeed on the merits of the appeal, (2) will the movant suffer irreparable
22 injury in the absence of a stay, (3) will other parties be substantially injured by a stay, and (4) where
23 the public interest lies. *Id.* (citing *Nken*, 556 U.S. 418, 434 (2009); *see also Trustees of Northern*
24 *Nevada Operating Engineers Health & Welfare v. Mach 4 Construction, LLC*, 2009 WL 1940087
25 *2 (D. Nev.) (citation omitted) (applying the same factors in addressing a stay pending appeal of a
26 magistrate judge’s order under the clearly erroneous standard of Fed. R. Civ. P. 72(a)). “The party
27 requesting a stay bears the burden of showing that the circumstances justify an exercise of [the
28 Court’s] discretion.” *Bullock*, 697 F.3d at 1203 (citation omitted).

1 AEI seeks a stay of the undersigned's Order (#153) pending resolution of its written
2 objections. Each of the motions considered as part of the order were referred to the undersigned
3 pursuant to Local Rule IB 1-3, which provides that "[a] magistrate judge may hear and finally
4 determine any pretrial matter not specifically enumerated as an exception in 28 U.S.C. §
5 636(b)(1)(A)." The order was a non-dispositive pretrial order. None of the motions considered is
6 falls under the enumerated exceptions listed within section 636(b)(1)(A). Written objections to
7 non-dispositive pretrial orders are not subject to *de novo* review, but are considered under the
8 "clearly erroneous" or "contrary to law" standard. AEI asserts that the circumstances justify the
9 Court exercising its discretion to stay implementation of the subject order.

10 Part of AEI's argument in favor of a stay pending resolution of the appeal is the need to
11 maintain the "status quo." Preservation of the status quo is not "among the factors regulating the
12 issuance of a stay." *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d
13 1112, 1116 (9th Cir. 2008). *Id.* Analysis of the traditional stay factors contemplates
14 "individualized judgments in each case . . . the formula cannot be reduced to a set of rigid rules."
15 *Id.* As stated in *Golden Gate*, "[m]aintaining the status quo is not a talisman." *Id.* Certainly an
16 aggrieved party has the opportunity to file and serve timely objections to an order issued by a
17 magistrate judge on a non-dispositive pretrial motion, but such objections do not serve to
18 automatically stay implementation of the order. *See In re Air Crash at Taipei, Taiwan*, 2002 WL
19 32155477 (C.D. Cal.) ("Such an interpretation is more consistent with the Magistrate's Act's goals
20 of facilitating the quick and final resolution of referred pretrial matters. If an objection operates as
21 a stay of the order, not only is the losing litigant given an artificial incentive to object, but the
22 [magistrate judge's] decision-making ability is eroded. It should be remembered that the magistrate
23 [judge] is empowered to 'determine' pretrial matters. A [magistrate judge's] order will not
24 determine anything if it can be automatically stayed by filing an objection. Indeed, such an
25 interpretation would essentially reduce the [magistrate judge's] order to the status of a
26 recommendation where an objection is raised."); *see also De Leon v. CIT Group, Inc.*, 2013 WL
27 950527 (D. Nev) ("The filing of objections to a magistrate judge's order on a non-dispositive
28 matter does not stay the order's operation."); *Oracle American, Inc. v. Google, Inc.*, 2011 WL

3794892 (N.D. Cal.) (same); *Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb, Inc.*, 124 F.R.D. 75, 79 (S.D.N.Y. 1989) (“[A]llowing the automatic stay of [magistrate judge’s] orders would not only encourage the filing of frivolous appeals, but would grind the magistrate system to a halt.”).

As discussed below, the undersigned finds that AEI has not satisfied its burden to demonstrate that Order (#153) should be stayed pending resolution of the written objections.

1. Strong Showing that Success is Likely on the Merits

As noted in *Lair*, “[t]he first two [] factors are the most critical.” 697 F.3d at 1204 (citing *Nken*, 556 U.S. at 434). There is not a precise specification of the exact degree of likely success that a party requesting a stay must show. *Lair*, 697 F.3d at 1204. It is, however, “not enough that the likelihood of success on the merits is ‘better than negligible’ or that there is a ‘mere possibility of relief.’” *Id.* (citing *Nken*, 556 U.S. at 434). A “possibility standard would be too lenient.” *Nken*, 556 U.S. at 435 (citation omitted). There are several, largely interchangeable, iterations of this standard which “indicate that, at minimum” a petitioner must shown that there is a substantial case for relief on the merits.” *Lair*, 697 F.3d at 1204 (citation omitted).

AEI has not shown that it has a substantial case for relief on the merits. The arguments presented for relief on appeal are all premised on AEI’s contention that the undersigned committed clear error by rejecting a self-serving affidavit submitted by an expert to contradict his prior sworn deposition testimony. AEI’s argument significantly undervalues sworn deposition testimony and is a continued attempt to recast what is clearly detrimental testimony. The undersigned does agree with one basis for the objection; that the sworn deposition testimony was a “rambling” answer. AEI, however, has submitted nothing to support the notion that a rambling deposition answer should be given any less weight than a targeted, concise answer. Nor does AEI cite any law to support the proposition that it is clear error to credit sworn deposition testimony over a “clarifying” declaration. Indeed, in other contexts, this exact proposition is rejected. *See e.g. Guerra v. Just Mortg., Inc.*, 2013 WL 1561114 (D. Nev.) (When considering a Rule 56 motion, an affidavit that contradicts a witnesses own deposition testimony does not create an issue of material fact or a triable issue) (citing *Orr v. Bank of America*, 285 F.3d 764, 780 n. 28 (9th Cir. 2002)).

1 Consequently, the undersigned concludes that, at best, the likelihood of success on the merits of the
2 appeal do not rise above “better than negligible” or a “mere possibility for relief.”

3 **2. Irreparable Injury to AEI**

4 “Whether the [stay] applicant will be irreparably harmed absent a stay[] requires more than
5 some possibility of irreparable injury.” *Lair*, 697 F.3d at 1214 (citations omitted). It requires the
6 stay applicant to show “that there is a probability of irreparable injury” in the absence of a stay. *Id.*
7 In analyzing this factor, a court focuses on the “individualized nature of irreparable harm” as
8 opposed to whether the harm is “categorically irreparable.” *Id.* AEI has not met its burden to
9 demonstrate that it will be irreparably injured absent a stay. The “probability” of injury articulated
10 by AEI in its motion is based on the entirely unsupported, speculative argument that Great West
11 will be able to use information from the Kezer documents, either directly or indirectly, in the
12 litigation “even if the privilege is upheld.” However remote the possibility may be, if AEI’s
13 clawback claim is upheld there are plenty of tools available to the Court, and parties, to ensure that
14 none of the information is used within this litigation.

15 Moreover, Great West has already agreed not to disseminate the documents outside of this
16 litigation or do anything to compromise the confidentiality of the documents. This agreement, in
17 the undersigned’s view, removes virtually any possibility of irreparable injury. It appears the real
18 basis for AEI’s argument on the probability of injury is rooted in the *ipse dixit* statement that “[a]
19 stay pending appeal to preserve the status quo should be normal procedure when a District Judge is
20 reviewing a magistrate judge’s privilege waiver ruling.” It is not surprising that counsel provides
21 no support for this statement as it is, in fact, a categorically false statement of the law regarding
22 appeals of non-dispositive pretrial orders entered by a magistrate judge. *See supra* at 3:10-4:4.

23 **3. Injury to Great West and Public Interest**

24 The Court does not believe that Great West would suffer any injury if there were a stay.
25 The Court agrees with AEI that, other than the general interest in prompt resolution of court
26 proceedings this dispute, the public interest is minimal in a dispute between two insurance
27 companies regarding the meaning of contractual terms between the companies.

28 **4. Interrelated Legal Tests**

1 AEI also opines that a stay should be considered under “two interrelated legal tests” that
2 “represent the outer reaches of single continuum.” *Trustees of Northern Nevada Operating*
3 *Engineers Health & Welfare, LLC*, 2009 WL at *2 (citing *Golden Gate Restaurant Ass’n*, 512 F.3d
4 at 1115-16). Having failed to demonstrate a probability of success or possibility of an irreparable
5 injury, the undersigned is not convinced that the “sliding scale” approach tips in favor of a stay.

6 **CONCLUSION**

7 Ultimately, AEI has not satisfied the standard for a stay pending appeal of the undersigned’s
8 non-dispositive pretrial Order (#153). AEI did not demonstrate a substantial case for relief on the
9 merits, and it did not demonstrate that it would be irreparably injured. Having failed to satisfy
10 these two critical factors, a stay is not appropriate. Nevertheless, Great West will be held to its
11 agreement that it will undertake no action to compromise the claim of privilege outside of this
12 litigation, and that it will make every effort to maintain the confidentiality of the Kezer documents
13 within this litigation. Having so concluded, the Court will also grant Great West’s Unopposed
14 Motion for Extension of Time to Respond to the Written Objection (#164). Great West shall file
15 its response by **Tuesday, November 12, 2013**. AIE’s reply, if any, is due by **Monday, November**
16 **18, 2013**.

17 Based on the foregoing and good cause appearing therefore,

18 **IT IS HEREBY ORDERED** that Defendants’ Partially Unopposed Motion to Stay One
19 Aspect of Magistrate Judge’s September 23, 2013 Discovery Order Pending Ruling by District
20 Judge on Written Objections (#155) is **denied**.

21 **IT IS FURTHER ORDERED** that Plaintiffs’ Unopposed Motion for Extension of Time to
22 Respond to the Written Objection (#164) is **granted**. Great West shall file its response by
23 **Tuesday, November 12, 2013**. AIE’s reply, if any, is due by **Monday, November 18, 2013**.

24 DATED: November 6, 2013.

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26 
27 **C.W. Hoffman, Jr.**
28 **United States Magistrate Judge**